§ 353.22 Administrative review of orders and suspension agreements.

(a) *Request for Administrative Review; Withdrawal of Request for Review.*

(1) Each year during the anniversary month of the publication of an order (the calendar month in which the anniversary of the date of publication of the order or finding occurs), an interested party, as defined in paragraph (k)(2), (k)(3), (k)(4), (k)(5), or (k)(6) of § 353.2, may request in writing that the Secretary conduct an administrative review of specified individual producers or resellers covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers.

(2) During the same month, a producer or reseller covered by an order may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or reseller of the merchandise imported by that importer. . . .

(e) *Automatic assessment of duty.*

(1) For orders, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), or (a)(3) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse,

for consumption and to continue to collect the cash deposits previously ordered.

IV. STATEMENT

A. The Antidumping Investigation And Antidumping Duty Order

Pursuant to a petition filed by Micron on April 22, 1992, the United States Department of Commerce ("Commerce") conducted an antidumping duty investigation regarding imports of DRAMs from Korea. Following determinations by Commerce that the subject merchandise was being sold at less than fair value, and by the U.S. International Trade Commission that the subject imports were causing material injury to the domestic industry (including Micron), Commerce published an antidumping duty order. *Antidumping Duty Order And Amended Final Determination: Dynamic Random Access Memory Semiconductors Of One Megabit And Above From The Republic Of Korea,* 58 Fed. Reg. 27520 (Dep't Commerce May 10, 1993). Pursuant to this order, importers of DRAMs originating in Korea and manufactured by LG Semicon, Co. Ltd. (formerly Goldstar Electron, Co., Ltd.) ("LG Semicon") or by Hyundai Electronics Industries, Inc. ("Hyundai") were required to post cash deposits of estimated antidumping duties at the time of entry. The applicable duty deposit rates were 4.97% for DRAMs manufactured by LG Semicon and 11.16% for DRAMs manufactured by Hyundai. *Id.*

B. Statutory And Regulatory Provisions For Administrative Review Of The Antidumping Order

Under the antidumping duty statute and Commerce's implementing regulations, the estimated antidumping duty deposited at the time of entry may be subject to a retrospective review to determine whether the cash deposit rate fairly reflects the margin of dumping for those transactions subject to review. 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(a) (1995) (current version at 19 C.F.R. § 351.213(b)). Each year during the anniversary month of the antidumping duty order, reviews may be requested by the foreign producer, the exporter, the importer, or domestic interested parties. 19 U.S.C. § 1675(a). At the conclusion of a review, Commerce issues liquidation instructions directing the Bureau of Customs and Border Protection ("Customs") to assess antidumping duties on entries covered by the review. The assessments may be at rates higher or lower than the cash deposit rates applicable at the time of entry. If the rate determined in the review is higher, the importer must pay the difference (with interest); if the rate determined in the review is lower, the difference is refunded (with interest). If a party does not request a review, that party's entries are subject to automatic assessment at the cash deposit rates. 19 C.F.R. § 353.22(e) (1995) (current version at 19 C.F.R. § 351.212(c)). This system of reviews on request assumes that interested parties will request reviews if they are in disagreement with the cash deposit rates applied to the subject imports at the time of entry. In fact, Congress specifically established this statutory scheme to place the burden on parties

who wanted their entries reviewed to request a review.[2] As shown below, Renesas failed to request a review.

C. Renesas's Entries And Its Opportunities To Request Administrative Reviews

Renesas imported certain entries of DRAMs manufactured by LG Semicon from July 1993 to May 1995. Renesas purchased the Korean DRAMs from a Japanese reseller not affiliated with LG Semicon, the Korean manufacturer, and imported them with full knowledge that they were subject to the antidumping duty order. Renesas was aware that its DRAMs were subject to the antidumping duty order because it was required to post cash deposits of estimated antidumping duties at the rate specified in the antidumping duty order. Renesas was required by Commerce to post cash deposits at the rate of 4.97% applicable to DRAMs manufactured by LG Semicon. JA 47.

1. The first administrative review (October 1992-April 1994)

On May 4, 1994, in the first anniversary month of the DRAMs antidumping order, Commerce published notice of an opportunity to request a review for the first administrative review period, October 29, 1992 to April 30, 1994. *Antidumping Or Countervailing Duty Order, Finding, Or*

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[2] Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a). In the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law.

Suspended Investigation; Opportunity To Request An Administrative Review, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994). Petitioner Micron requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and or related parties. . . ." JA 66-67. Producers Hyundai and LG Semicon requested administrative reviews of their own pricing practices. JA 48-49, 52-53. Neither Renesas nor its Japanese reseller, which was not affiliated with LG Semicon, requested a review of Renesas's entries or participated in the review requested by the other interested parties. Commerce initiated an administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews And Request For Revocation In Part,* 59 Fed. Reg. 30770 (Dep't Commerce June 15, 1994).

On May 6, 1996, Commerce published the final results of the first administrative review. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216 (Dep't Commerce May 6, 1996). Based on the sales reported by each reviewed company, Commerce found a weighted average dumping margin of 0.00% for LG Semicon and 0.06% for Hyundai. *Id.* at 20222. Because neither Renesas nor its Japanese reseller requested a review, Renesas's entries were not covered by the review and, therefore, were not examined by Commerce.

2. The second administrative review (May 1994-April 1995)

On May 10, 1995, in the second anniversary month of the DRAMs order, Commerce published notice of an opportunity to request an administrative review for the second review period, May 1, 1994 to April 30, 1995. *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review,* 60 Fed. Reg. 24831 (Dep't Commerce May 10, 1995). Petitioner Micron again requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and/or affiliated parties. . . ." JA 102-103. Producers Hyundai and LG Semicon again requested administrative reviews of their own pricing practices. JA 95-96, 99-100. Commerce initiated the second administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews,* 60 Fed. Reg. 31447 (Dep't Commerce June 15, 1995). Again, neither Renesas nor its Japanese reseller requested or participated in this review.

On January 7, 1997, Commerce published the final results for the second review period. Commerce determined a weighted average dumping margin of 0.01% for LG Semicon and 0.10% for Hyundai. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review,* 62 Fed. Reg. 965, 968 (Dep't Commerce Jan. 7, 1997). Not having requested or participated in this review, Renesas's entries, purchased from the Japanese reseller, were not taken into account in determining these rates, and no separate rate was calculated for Renesas's entries.

D. Judicial Review Of Commerce's First And Second Administrative Reviews And The Issuance Of Commerce's Liquidation Instructions

Following publication of the final results of the first and second administrative reviews, Micron sought judicial review of certain aspects of Commerce's determinations. In each case, the CIT remanded the determinations to Commerce for further consideration and explanation of the basis for its determination. *See, e.g., Micron Tech. v. United States*, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999) (remanding first review determination on calculation of research and development expenses); *Micron Tech. v. United States*, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999) (remanding second review for consideration of constructed export price level of trade issue), *aff'd in part, rev'd in part*, 243 F.3d 1301 (Fed. Cir. 2001).

Following the CIT decisions affirming the redeterminations after remand in the first and second administrative reviews, Commerce issued liquidation instructions to Customs for the first and second administrative reviews on November 1, 1999. Commerce's instructions covering DRAMs from Korea that were entered during the first and second review periods included importer-specific assessment rates for each of the importers whose entries were covered by the first and second administrative reviews, respectively. JA 133-36. According to the instructions, entries of DRAMs from Korea imported by all other importers should be liquidated "at the rates required upon entry," that is, at the cash deposit rate. JA 133-36. The first and second administrative review instructions applied to Renesas's entries as non-reviewed entries not covered by the importer-specific instructions.

E. Judicial Review Of Commerce's Liquidation Instructions

Renesas challenged Commerce's liquidation instructions, and the CIT held that Renesas's entries should be liquidated at the manufacturer's rate calculated during the administrative review. *Renesas Tech. Am., Inc.*, No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105 (Ct. Int'l Trade Aug. 18, 2003) (Pet. App. at 4). The CIT applied the reasoning of a nearly identical case decided by that court, *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580 (Ct. Int'l Trade 2001), *rev'd*, 348 F.3d 997 (Fed. Cir. 2003), and concluded, among other things, that (i) Commerce erred in applying the "knowledge test" to determine whether sales made through a reseller are "covered" by an administrative review and (ii) Commerce's November 1, 1999 liquidation instructions were arbitrary and capricious because they represented a change from Commerce's "past practice of liquidating at 'the rate established for the most recent period for the manufacturer of the merchandise,' 61 Fed. Reg. 20,216, 20,222." *Renesas Tech. Am., Inc.*, No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105, at *17-18 (Ct. Int'l Trade Aug. 18, 2003) (Pet. App. at 18).

Before the United States and Micron filed their appeals, the Federal Circuit reversed the CIT's *Consolidated Bearings* decision. *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) ("*Consolidated I*"). The Federal Circuit held that an importer's entries purchased from a reseller unaffiliated with the manufacturer are not covered by an administrative review unless information about those entries is before Commerce during the review. *Id.* at 1005. Discussing the applicability of 19 U.S.C. § 1675(a)(2)(C) to sales made by a reseller, the Federal Circuit held the following:

> This subsection requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties.

Id. at 1005-06. The Federal Circuit also held that Commerce retained the discretion to determine the most appropriate method for assessing antidumping duties on unreviewed entries purchased from a reseller unaffiliated with the manufacturer, *id.* at 1007, and remanded the case with instructions to require the importer to show that "Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice." *Id.* Commerce conducted the remand and concluded that it had a practice of liquidating unreviewed entries from resellers unrelated to the manufacturer at the cash deposit rate. The Federal Circuit affirmed Commerce's remand determination on the ground that "substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." *Consolidated Bearings Co. v. United States*, 412 F.3d 1266, 1272 (Fed. Cir. 2005) ("*Consolidated II*").

In deciding the appeal of the instant case, the Federal Circuit was bound by its decisions in *Consolidated I*, *Consolidated II*, and *Nissei Sangyo Am. Ltd. v. United States*, No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 24124 (Fed. Cir. Oct. 18, 2005), *petition for cert.*

filed, No. 05-918 (U.S. Jan. 17, 2006) ("*Nissei Sangyo*").[3] In particular, the Federal Circuit held that

> The relevant facts and issues raised by the parties in this case are materially indistinguishable from those in [*Nissei Sangyo*]. As discussed in *Nissei Sangyo*, this Court's decisions in [*Consolidated I*] and [*Consolidated II*] foreclose appellee's arguments. In those cases, this court held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that the Department of Commerce ("Commerce") has consistently liquidated unreviewed entries at the cash deposit rate.

Renesas Tech. Am., Inc., No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005) (Pet. App. at 2)

V. REASONS FOR DENYING THE PETITION

A. The Federal Circuit's Decision Does Not Implicate An Important Issue Of Federal Law

1. Renesas seeks *certiorari* review of an assessment practice that was not actually applied to it or adjudicated by the Federal Circuit

Renesas contends that the Federal Circuit's decision imposes substantial and needless costs on U.S. importers that purchase from resellers. (Pet. at 17). Renesas cites certain publications for the proposition that "[s]ome $14

[3] *Nissei Sangyo Am. Ltd. v. United States* is also currently before this Court on a petition for writ of *certiorari*. *Hitachi High Technologies America, Inc. v. United States*, No. 05-918 (U.S. Jan 24, 2006).

billion worth of imports were covered by antidumping tariffs approved between 1994 and 2003 . . . ," *id.*, an average of $1.4 billion per year from 1994 to 2003.[4] In Renesas's view, because no other avenue for review is available to U.S. importers through U.S. courts,[5] *certiorari* review is necessary to prevent the Federal Circuit's decision from becoming "the last word on the matter." (Pet. at 21).

These statements are misleading and irrelevant. Less than 0.5 percent of all imports into the United States are subject to an antidumping duty order,[6] and only a fraction of those imports are purchased from a reseller unrelated to

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[4] Renesas also claims that "U.S. law provides a powerful legal weapon to domestic industries unhappy with foreign competition: the antidumping law. . . ." (Pet. at 17). In fact, the antidumping law is designed to provide a remedy for domestic industries injured as a result of illegal and unfair trade practices undertaken by foreign manufacturers and exporters. *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) ("The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' *i.e.*, at prices below the prices the foreign manufacturers charge for the same products in their home markets."). It is not available to any domestic industry who is merely "unhappy" with foreign competition.

[5] The CIT has exclusive jurisdiction over these cases. 28 U.S.C. § 1581(i). The Federal Circuit has exclusive jurisdiction over appeals from CIT judgments. 28 U.S.C. § 1295(a)(5).

[6] In 1999, Commerce Secretary William Daley testified that U.S. antidumping duty orders affected only a minuscule percent of U.S. imports:

> In 1998, total U.S. imports were $897 billion. Only about $4 billion of those were covered by antidumping duty orders. That means that 0.44 percent – less than one-half of one percent – of our worldwide imports were covered.

Ministerial Meeting of the World Trade Organization (WTO): Hearing Before Senate Finance Comm., Sept. 29, 1999 (Statement of William Daley, Sec'y of Commerce of the United States), *available at* www.ogc.doc.gov/ogc/legreg/testimon/106f/daley0929.htm.

the original foreign manufacturer rather than from the original foreign manufacturer directly. Moreover, as discussed in detail below, the antidumping statute authorizes reviews only upon request, and Commerce's regulations specifically permit importers to request a review of the pricing practices of the unrelated reseller/exporter. Thus, the Federal Circuit's decision affects only a tiny subset of importers – specifically, those who import goods covered by an antidumping duty order sold to them by resellers unrelated to the original manufacturer and who fail to request an administrative review of the reseller/exporter's pricing practices. This Court should not exercise its discretionary *certiorari* jurisdiction over a case that has such little impact on the importing community, particularly when the persons who would be affected by such decision can so easily protect their interests by the simple expedient of requesting an administrative review under the statute. 19 U.S.C. § 1675(a). Again, Renesas did not protect its interests by requesting a review.

The Federal Circuit also appears to have recognized the limited application of its decision when it made the decision non-precedential under Federal Circuit Rule 47.6(b). That rules states that "[a]n opinion or order which is designated as not to be cited is one determined by the panel issuing it as not adding significantly to the body of law."[7]

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[7] The reprint of the Federal Circuit's decision attached to Renesas's petition does not reflect this qualifying language. The Federal Circuit's actual decision, available at No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 21877 (Fed. Cir. Sept. 19, 2005), however, makes clear that the decision is non-precedential.

Renesas attempts to avoid the insignificance of the Federal Circuit's decision to the U.S. importing community by contending that a different assessment policy – one that was not actually applied to it in this case – imposes potentially great costs on U.S. businesses:

> In October 1998, . . . Commerce published in the *Federal Register* its proposal to change its policy concerning the assessment of antidumping duties on merchandise imported from a reseller. Under that policy, . . . importers that purchase from resellers are subject to liquidation of their duties at the "all others" cash deposit rate set in the original investigation unless the importer requests a review of its reseller.
>
> As now implemented, Commerce's new interpretation of Section 1675(a)(2)(C) imposes potentially great costs on U.S. business. The "all others" rate is usually higher, and often significantly higher, than the rates calculated for individual producers in annual reviews. The all others rate, moreover, never changes throughout the duration of an antidumping order, even when the high investigation rates upon which it was based are superseded. Thus, the Federal Circuit's decision upholding Commerce's erroneous interpretation of Section 1675(a)(2)(C) dooms U.S. companies to pay excessive duties on every importation into the United States of subject goods purchased from resellers unless each reseller undergoes an individual review. . . .

(Pet. at 19-20). In this passage, Renesas refers to Commerce's 1998 proposed policy clarification, entitled *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 63 Fed. Reg. 55361 (Dep't Commerce Oct. 15, 1998) ("*Proposed Clarification*"), which

proposed to require unreviewed entries purchased from resellers unaffiliated with the original manufacturer to be assessed at the "all others" rate.

In fact, the assessment policy described in the *Proposed Clarification* was not before the Federal Circuit or the CIT. The "all others" rate was not applied to Renesas; the application of the "all others" rate was not at issue in the Federal Circuit case or CIT cases; and neither the Federal Circuit nor the CIT addressed whether an importer of merchandise exported by an unreviewed reseller should receive the "all others" rate or some other rate. Rather, the *Proposed Clarification* did not become effective until May 6, 2003 – after the events giving rise to this case. *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 68 Fed. Reg. 23954, 23961 (Dep't Commerce May 6, 2003) ("*Assessment Clarification*"); *Consolidated I*, 348 F.3d at 1006-07. Based on the effective date of this case, the new policy clarification did not apply. If this Court is interested in the issue, it should deny Renesas's petition and wait to review a case in which the "all others" rate was actually applied to an importer. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (dismissing a writ of *certiorari* as improvidently granted because deciding the case would require the Court to resolve a constitutional question that was entirely hypothetical).[8]

[8] Renesas also is wrong in asserting that the "all others" rate is "usually significantly higher than the rates calculated for individual manufacturers in annual reviews." (Pet. at 19). Rather, as Renesas admits, the "all others" rate "is the *weighted average* of the rates calculated for the individually investigated producers and exporters." (Pet. at 6) (emphasis supplied). Accordingly, the rate is sometimes

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2. The antidumping statute and Commerce's regulations provided Renesas with a vehicle for review of the reseller's pricing practices and the calculation of a rate specific to its entries

Renesas concedes that a statutory remedy was available that would allow it to avoid having its entries assessed at the cash deposit rate, and that this remedy remains available to other importers who purchase their goods from resellers unrelated to the manufacturer. (Pet. at 21). The remedy, of course, is to request an administrative review of the pricing practices of the reseller/exporter that resold the subject merchandise to the importer. Under the statute, 19 U.S.C. § 1675(a), and the regulation applicable to Renesas during the first and second reviews, "an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or *reseller* of the merchandise imported by that importer." 19 C.F.R. § 353.22(a) (emphasis supplied), *Antidumping Duties,* 54 Fed. Reg. 12742, 12778 (Dep't Commerce Mar. 28, 1989). Accordingly, Renesas easily could have prevented the application of the cash deposit rate to its entries simply by requesting a review of its reseller. Indeed, two other importers in the first administrative review took advantage of this mechanism and requested reviews of 16 Japanese resellers of DRAMs. JA 56-57, 60-62.

Renesas nevertheless argues that mere participation in the administrative review "will potentially cost importers many millions of dollars." (Pet. at 21). Renesas's

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higher and sometimes lower than the calculated rate for any individual manufacturer.

concern about the cost of participating in an administrative review, however, does not justify *certiorari* review. Rather, as the courts have acknowledged, it is a normal cost of business that must be weighed against the benefits of importing into the U.S. *See, e.g., J.S. Stone, Inc. v. United States*, 297 F. Supp. 2d 1333, 1344 (Ct. Int'l Trade 2003), *aff'd*, 111 Fed. Appx. 611 (Fed. Cir. 2004). Moreover, Congress enacted the current administrative review procedures to ascertain foreign producers' and exporters' pricing practices without imposing undue burdens on the parties. In particular, in the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a).[9] Pursuant to this legislation, Commerce promulgated its regulations permitting importers to request a review of their resellers and providing for assessment at the cash deposit rate of those entries for which no review has been requested. 19 C.F.R. § 353.22(a), (e). Thus, Congress evaluated the benefits and burdens of administrative

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[9] The accompanying House Conference Report to the Trade and Tariff Act of 1984 states that this provision

> [I]s designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority. The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered. . . .

H.R. Conf. Rep. No. 98-1156 at 180, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5298.

reviews and struck an appropriate legislative balance. *Certiorari* review is not warranted just because Renesas would have preferred a different legislative outcome (*i.e.*, one in which an importer of unreviewed entries from an unrelated reseller automatically receives the manufacturer's rate).

Renesas further argues that the Federal Circuit's decision

> [L]eads to irrational, if not bizarre, economic results. As an importer of a commodity product like DRAMs, Renesas followed the market and should have had the same review result as LG if Renesas had requested its own review of its reseller or of LG. Thus, seeking its own redundant review would have been pointless.

(Pet. at 20-21). *Consolidated I* addressed and dismissed this very argument:

> [I]mporters of the same merchandise can have different antidumping duties, just as the final results in this case established various importer-specific rates for those who participated in the review. The character of the merchandise does not control the assessment of duties, but the market forces in play at the time of each separate import transaction [do]. *The simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties.* Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties.

Consolidated I, 348 F.3d at 1005 (emphasis supplied).

Moreover, Renesas's argument is belied by its own business model. As an importer of a commodity product resold by a Japanese reseller unrelated to the manufacturer, Renesas apparently makes its profit exploiting differences between the price of DRAMs in Japan and the price of DRAMs in the U.S. The price differences that allow Renesas to make a profit are the same price differences that would have yielded a different dumping margin if Renesas had only requested a review. In any event, absent an administrative review of the Japanese resellers' pricing practices, no one can be certain that Renesas's DRAMs were priced the same as LG's DRAM shipments to the United States.

3. Review of the Federal Circuit's decision would require this Court to engage in a duplicative, fact-specific inquiry

The Federal Circuit's decision does not warrant *certiorari* review because such review necessarily would entail a detailed examination of the facts duplicative of the one already undertaken by the Federal Circuit. As noted above, the Federal Circuit held that Commerce "'has consistently liquidated unreviewed entries [from unrelated resellers] at the cash deposit rate.'" *Renesas Tech. Am., Inc.*, No. 04-1473, -1474 (Pet. App. at 2) (citations omitted).[10] The Federal Circuit reached this conclusion after

[10] Throughout its Petition, Renesas asserts that Commerce's "long-settled policy" was to assess unreviewed entries purchased from resellers unaffiliated with the manufacturer at the manufacturer's rate. (Pet. at 13, 14, 15, 19). The Federal Circuit's examination of the extensive factual record of Commerce's historic assessment practice in *Consolidated II* completely contradicts Renesas's assertion. For a thorough discussion of Commerce's historic assessment practice, *see*

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examining over 100 pages of Commerce's liquidation instructions representing years of Commerce's assessment practice. This Court should not exercise *certiorari* jurisdiction to repeat a factual inquiry already conducted by the Federal Circuit in both *Consolidated II* and this case. S.Ct.R. 10 ("A petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

B. The Federal Circuit Correctly Decided The Case

It is undisputed that Renesas failed to request a review. It also is undisputed that Renesas's entries were not actually examined during Commerce's review of the manufacturer's U.S. sales. As shown below, no other review request by any other party encompassed Renesas's entries. Based on these facts, the Federal Circuit held that "an unreviewed reseller is not statutorily entitled to the manufacturer's review rate. . . ." *Renesas Technology America, Inc.*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005) (Pet. App. at 2). The Federal Circuit's decision was based expressly on *Consolidated I*, which concluded that, "[i]f the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The 'entries' must be 'covered by the determination' to gain entitlement to the review's results as the

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Consolidated II, 412 F.3d at 1270-72. Moreover, under Commerce's "knowledge test," discussed below, the producer's rate could not be used for Renesas's entries. The producer did not set the prices of Renesas's DRAMs, which Commerce examines during the administrative review.

'basis for the assessment' of duties." *Consolidated I* at 1005-06. The Federal Circuit also held that Commerce "'has consistently liquidated unreviewed entries [from unrelated resellers] at the cash deposit rate.'" *Id.* Renesas disputes these conclusions on several grounds, none of which has merit.

Renesas first argues that Micron's request for a review of "the subject merchandise manufactured and/or sold by" LG Semicon, the manufacturer, during the first and second reviews meant that all LG-manufactured entries, including Renesas's, were "covered by the determination." (Pet. at 22-25). Renesas is wrong. Under the regulation in effect during the review, a domestic interested party "may request in writing that the Secretary conduct an administrative review of *specified* individual producers or *resellers* covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers." 19 C.F.R. § 353.22(a)(1) (emphasis supplied).[11]

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[11] Commerce used similar language in the *Federal Register* notices announcing the opportunity to request administrative reviews:

> For antidumping reviews, the interested party must specify for which individual producers or resellers covered by an antidumping finding or order it is requesting a review, and the requesting party must state why the person desires the Secretary to review those particular producers or resellers.

Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review, 59 Fed. Reg. 23051, 23052 (Dep't Commerce May 4, 1994); *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review*, 60 Fed. Reg. 24831, 24832 (Dep't Commerce May 10, 1995).

The Federal Circuit and the CIT have interpreted this regulation as requiring the domestic industry to identify *by name* the exporters for which it seeks a review before that exporter's entries are included within the scope of the request. *Floral Trade Council v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989) ("[Commerce] acted in accordance with its regulation when it declined to implement [petitioner's] request for review of importers and their unnamed suppliers because the request was not for review of 'specified individual manufacturers, producers, or exporters. . . .'"); *Floral Trade Council v. United States*, 17 CIT 1417, 1418 (1993) (section 353.22 of Commerce's regulation "may reasonably be interpreted as requiring requesters to *name* exporters and producers") (emphasis in original). Because Micron did not name Renesas's reseller, Micron's review request cannot be interpreted as covering Renesas's entries, and Renesas had no right to expect that its entries would be covered by the review.[12]

Renesas further argues that, "when Commerce conducts a review of a foreign party in its capacity as a *producer* pursuant to a request for such a review, all 'entries of merchandise' produced by that company are 'covered by the determination' in the annual review such that the determination 'shall be the basis for the assessment of' antidumping duties on entries of the merchandise pursuant to 19 U.S.C. § 1675(a)(2)(C)." (Pet. at 24). According to Renesas, therefore, Micron's request for a review of LG Semicon in its capacity as a producer necessarily included all LG-produced DRAMS, including those

[12] In fact, Micron did not even know of the existence of Renesas's first and second review entries until Renesas filed its complaint in the CIT.

sold to unrelated third party resellers. (Pet. at 24). Renesas's statement of the law is incomplete and misleading. Under its long-standing and judicially endorsed practice, Commerce employs the "knowledge test" to determine whether resold entries are "covered by the determination."[13] Under the "knowledge test," Commerce does not include in its administrative reviews U.S. sales made through unaffiliated resellers without the knowledge of the manufacturer that the sales were destined for the United States. The reason for the "knowledge test" is straightforward: If the producer does not know that subject merchandise sold to a third party reseller was destined for the United States, the producer cannot include those sales in its U.S. sales database submitted to Commerce by that producer and considered by Commerce in its review. Also, if a producer does not have knowledge that its merchandise is destined for the United States, its price to the unaffiliated reseller cannot be considered a "U.S. price." Instead, it is a price to the market in which the reseller is located, in this case, Japan.

The record below makes clear that LG Semicon had no knowledge of Renesas's entries. In accordance with its "knowledge test," Commerce's second review questionnaire asked for information regarding entries of subject merchandise sold

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[13] Contrary to Renesas's suggestion that the "knowledge test" was invented as part of Commerce's assessment policy clarification, (Pet. at 12, citing *Proposed Clarification*), the "knowledge test" has been an integral part of Commerce's practice for many years and has been sustained by the courts. *See, e.g., LG Semicon Co. v. United States*, 23 CIT 1074, 1079 (1999) ("Commerce's application of the 'knew or should have known' standard is in conformance with legislative history, is a consistent practice of the agency, and has been previously sustained by [the CIT]"), and cases and administrative determinations cited therein.

through a reseller that LG Semicon knew were destined for the United States. JA 111. (*See* Attached Appendix at App. 9). In its questionnaire response, LG Semicon denied having any knowledge of such sales. *Id.* As a result, the weighted average dumping margin calculated by Commerce for LG Semicon's U.S. sales did not include Renesas's entries.

Because Micron's review requests did not specify Renesas's reseller, and because LG Semicon was unaware that subject merchandise it sold to the reseller had been imported into the U.S. by Renesas, Renesas's entries were not covered by the reviews. In fact, it was abundantly clear to Renesas that its entries were not covered by the review. If its entries had been reviewed, Renesas would have received an antidumping duty questionnaire and would have had to submit sales data to Commerce, which it did not do. Renesas is a sophisticated importing company with sophisticated counsel. It knew quite well that its entries were not examined in the review because it received no questionnaire and did not answer any questions regarding its exports to the U.S. Therefore, to interpret Micron's requests in the manner proposed by Renesas would permit entries about which Commerce had no pricing information to be presumptively assessed the rate established for the producer. There is no statutory, regulatory, or policy support for such an interpretation.

Renesas next contends that Commerce correctly uses the manufacturer's investigation rate as the cash deposit rate for all importers' entries, but engages in "incongruous treatment" when it uses the manufacturer's calculated assessment rate for the manufacturer's entries and the manufacturer's cash deposit rate for the reseller's entries.

(Pet. at 25-26). Commerce explained the rationale for this practice in its *Proposed Clarification*:

> If there is no company-specific reseller cash deposit rate and the importer identifies the producer [as the manufacturer of the merchandise], the Department instructs Customs to apply the producer's cash deposit rate to the entry. This logic stems from the fact that, when subject merchandise enters the United States through a reseller, the Department does not know who set the price of the subject merchandise to the United States. The Department instructs Customs to apply the producer's cash deposit rate where the producer of the merchandise is identified on the assumption that the producer knew that the merchandise was destined for the United States. This assumption is more often true than not.

Proposed Clarification, 63 Fed. Reg. 55361, 55362 (Dep't Commerce Oct. 15, 1998). Of course, when the producer disclaims knowledge that merchandise sold to the third-country reseller was destined for the United States, as LG Semicon did here, there is no reason to assess those entries at the producer's final calculated assessment rate. Thus, there is nothing "incongruous" about Commerce's different treatment of these different situations. Rather, it is a natural consequence of Commerce's application of the "knowledge test."

Renesas also contends that Commerce advised that "entries of *all* subject merchandise produced by the reviewed producers would be treated according to the results of the reviews for the producers." (Pet. at 11, citing the "Futtner Memorandum"). In fact, the Futtner Memorandum was drafted to address a liquidation issue completely unrelated to the one raised by Renesas, that is, the assessment rates for

certain "Japanese resellers for whom administrative reviews have been requested." JA 71. Because Renesas did not request a review of its reseller, the Futtner Memorandum is inapposite. In addition, Renesas could not have relied on the Futtner Memorandum in deciding not to request a review of its entries, because the memorandum was issued *after* Renesas's opportunity to request a review in the first review had expired.[14]

Renesas next argues that (i) the third review liquidation instructions covering LG Semicon-produced entries ordered liquidation at the manufacturer's rate of entries that allegedly involved reseller transactions, including Renesas's; and (ii) the first and second administrative review liquidation instructions covering entries produced by Hyundai, another Korean DRAMs producer, ordered liquidation at the manufacturer's rate of all entries,

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[14] The Futtner Memorandum was placed on the record of the first administrative review on June 15, 1994, after the opportunity to request a review had passed on May 31, 1994. *See Opportunity To Request An Administrative Review*, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994).

Even if the Futtner Memorandum advised Renesas that its entries would be covered by the review, which it did not, Renesas would not have been entitled to rely on it because its interpretation of the memorandum is contrary to the automatic assessment regulation, 19 C.F.R. § 353.22(e), and because, under Commerce's delegation of authority and controlling case law, Mr. Futtner, a low level employee, was in no position to bind Commerce. 19 C.F.R. § 353.2(u) (delegating to the "Assistant Secretary for Import Administration the authority to make final determinations under [the administrative review provision]"); Department Organizational Order 10-3 (prohibiting redelegation of authority beyond the Assistant Secretary for Import Administration) JA 33-36; *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

including unreviewed entries of unrelated resellers. (Pet. at 11-12).

There is no record evidence of any reseller transactions that were made without the knowledge of LG Semicon in the third review,[15] none is cited anywhere in the six-year history of this case, and the third review instructions make no mention of any resellers or any announced Commerce practice with respect to the assessment of unreviewed entries of unrelated resellers. JA 116-17. Rather, the instructions simply refer to "all shipments" in much the same manner as the instructions considered and rejected as inconclusive of Commerce's practice by the *Consolidated II* Court. *Consolidated II*, 412 F.3d at 1271.

Similarly, there is no record evidence of any reseller transaction involving Hyundai-produced DRAMs in the first or second administrative reviews made without Hyundai's knowledge.[16] As pointed out in the briefs and at oral argument before the Federal Circuit, the first and second administrative review instructions for Hyundai-produced DRAMs do not state that DRAMs were imported

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[15] Renesas claims that it made entries during the third administrative review and that those entries were liquidated at the manufacturer's rate. (Pet. at 12). Renesas, however, cites no record evidence for this assertion, and there is none. At oral argument before the Federal Circuit, counsel for Micron pointed out that no record evidence supported Renesas's assertion, and counsel for Renesas failed to rebut this fact with any cite to the record or any other document.

[16] In fact, it is doubtful there were any unreviewed entries of unrelated resellers involving Hyundai-produced DRAMs, as Hyundai had its own U.S. subsidiary, Hyundai Electronics America, which it used to enter its imports. *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216, 20217, Cmt. 1 (Dep't Commerce May 6, 1996).

into the United States without the knowledge of the producer. JA 111(4)-(5), 118-19, 120-25. Nor do they refer to the existence of any resellers or any Commerce assessment practice for unreviewed entries of unrelated resellers. *Id.*

VI. CONCLUSION

For the foregoing reasons, Renesas's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

[JA 106]

[LOGO]

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230
A-580-812
ARP 05/01/94-04/30/95
Public Document

Goldstar Electron Co. Ltd/LG Semicon Co., Ltd.
c/o Michael P. House
Kaye, Scholer, Fierman, Hays & Handler
Suite 1100
901-15th Street, N.W.
Washington, DC 20005-2327

Jun. 26, 1995

Dear Mr. House:

I am writing to you on behalf of Import Administration, a unit of the United States Department of Commerce. On June 15, 1995, we initiated an administrative review to determine whether imports into the United States of a product that you are believed to produce and/or export were sold at prices that constitute dumping. We are examining sales, entries or shipments, as specified in the enclosed questionnaire, during the period May 1, 1994 through April 30, 1995. The products under review are dynamic random access memory semiconductors from the Republic of Korea. The antidumping duty order concerning this product went into effect on May 10, 1993.

We require the information requested in the enclosed questionnaire to determine whether subject merchandise that you produced and/or exported was in fact sold in, or to, the United States at prices below the normal value of the merchandise. General instructions for responding to the questionnaire follow immediately after the table of contents. We have divided the questionnaire itself into five

sections, A through E, and attached supplemental information, including a glossary of terms, in Appendices I through IV.

We request that you respond to sections A (General Information), B (Sales in the Home Market or to a Third Country), and C (Sales to the United States). If after examining sections A and C of the questionnaire you conclude that your company and its affiliates did not have any U.S. sales or shipments during the period identified above, please submit a statement to that effect, following the data submission requirements specified in the general instructions. If you do not submit such a statement for the administrative record in this case, we may conclude that your company has not been responsive to this questionnaire and may proceed on the basis of the facts available, as defined in the glossary of the attached questionnaire.

You are requested to respond at this time to the Cost of Production (COP) portion of section D if we disregarded below-cost sales in the most recently completed review or investigation of your company. Otherwise, you are not presently required to respond to the COP portion. However, if the petitioner or other U.S. domestic party alleges that your sales in the comparison market were made at prices below the cost of production, we may request at a later date that you respond to the COP portion.

[JA 107]

If you are required to respond to the COP portion of section D for any of the reasons stated above, you must also respond to the Constructed Value (CV) portion of section D with respect to all products or models sold in the United States. If you are not required to respond to the COP portion, we request that you respond to the CV portion with respect to products or models sold in the United States for which you had no contemporaneous sales of comparable merchandise in the comparison market, or if the contemporaneous sales that you report were made to affiliates.

If the subject merchandise was further processed in the United States, you are generally required to respond to section E (Cost of Further Manufacture or Assembly Performed in the United States). However, if you believe the value added in the United States exceeds substantially the value of the merchandise imported into the United States, please contact the official in charge immediately.

Please refer to the cover page and general instructions of the enclosed questionnaire [illegible] period covered by this review, the due dates for responding to the questionnaire [illegible] instructions for filing the response. If you have any questions about those or any other [illegible], please contact the official in charge.

If you are unable to respond to this questionnaire within the specified time limits or are unable to provide the information in the form required, please contact the official in charge of this review. We will attempt to accommodate any difficulties that you encounter in answering this questionnaire. However, that accommodation cannot conflict with our obligation to conduct the review

within the timeliness and informational requirements of United States law. In order to complete this review within the statutorily mandated deadlines and to ensure that all interested parties have a sufficient opportunity to participate in this proceeding, extensions will not ordinarily be granted.

Sincerely,

/s/ Thomas F. Futtner
Thomas F. Futtner
Program Manager, Division I
Office of Antidumping
Compliance

App. 5

[JA 108]

PUBLIC VERSION

BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS OF ONE MEGABIT AND ABOVE FROM THE REPUBLIC OF KOREA	))))))	Case No. A-580-812 Second Administrative Review PUBLIC VERSION

RESPONSE OF LG SEMICON CO., LTD. AND LG SEMICON AMERICA, INC. TO THE DEPARTMENT OF COMMERCE REQUEST FOR INFORMATION

Michael P. House
Raymond Paretzky

Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
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Washington, D.C. 20005
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Response to Section A

August 29, 1995

[JA 109]

PUBLIC VERSION

SECTION A

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PUBLIC VERSION

LG SEMICON CO., LTD.
2ND ADMINISTRATIVE REVIEW

SECTION A

Organization, Accounting Practices, Markets and Merchandise

LG Semicon Co., Ltd. ("LGS") and LG Semicon America, Inc. ("LGSA") (collectively, "LG Semicon") hereby respond to § A of the Department's questionnaire.

1. *Quantity and Value of Sales*

Information on the quantity and value of sales is necessary to determine whether we will attempt to compare the prices of merchandise under review sold to the United States market to (a) the prices of comparable merchandise in your home market, (b) prices of comparable merchandise in a third-country market or (c) constructed value.[1] *Refer to the term viability in the Glossary of Terms at Appendix I for a more complete discussion.*

For the remainder of this section of the questionnaire we refer to the home market or third-country market selected

[1] *Throughout this questionnaire, whenever we refer to the "products under review" or "merchandise under investigation," we are referring generally to all products within the scope of the order that your company sold during the period of review in any market. When we use the term subject merchandise, we are referring to products sold to the United States. When we use the term foreign like product, we are referring to products sold in your home market or exported to a country other than the United States. We have provided a description of the merchandise included in the review in Appendix III.*

for the calculation of normal value as the comparison market.

a. State the total quantity and value of the merchandise under review that you sold during the period of review ("POR") in:

[JA 111]

PUBLIC VERSION

9. Exports Through Intermediate Countries

If you are aware that any of the merchandise you sold to third countries was ultimately shipped to the United States, please contact the official in charge within two weeks of the receipt of this questionnaire.

9. Not applicable.

10. Sales of Merchandise Under Review Supplied by an Unaffiliated Producer

Please respond to this section of the questionnaire if neither your company nor an affiliate produced the merchandise under review which you sold in either the comparison market or to the United States.

10. Not applicable.

(4)

No. 05-986

IN THE
Supreme Court of the United States

RENESAS TECHNOLOGY AMERICA, INC.,
Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEFS IN OPPOSITION

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April 25, 2006

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Renesas Technology America, Inc. ("Renesas") incorporates by reference the Corporate Disclosure Statement included in its petition for writ of certiorari filed February 2, 2006.

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REPLY TO BRIEFS IN OPPOSITION

Renesas respectfully offers this reply in support of its petition for writ of certiorari. Notwithstanding the objections raised by the government and Micron Technology, Inc. ("Micron"), this Court should grant Renesas' petition for the reasons set forth in its petition filed February 2, 2006, and the further support provided herein.

I. Respondents Do Not Dispute That the Federal Circuit Decision Imposes Substantial Costs on U.S. Importers That Purchase from Resellers

Neither the government nor Micron disputes that the Federal Circuit's decision imposes substantial costs on U.S. importers that purchase from resellers. Under the Federal Circuit decision, importers of goods subject to antidumping duties that purchase from resellers are required to pay excessive duties, unless such importers opt to seek costly and redundant administrative reviews of goods sold by the reseller. *See* Pet. at 19–21.

Micron argues that only .5 percent of all U.S. imports are subject to antidumping duties, and that "only a fraction" of those imports are purchased from resellers. Micron Opp. Br. at 13–14. However, "only a fraction" of a very large number is still a large number. As Micron concedes, *see id.*, antidumping duties were imposed on an average of $1.4 billion worth of imports per year from 1994 to 2003. If only 25% of such duties involved imports of goods from resellers, the Federal Circuit's decision would affect

duties imposed on $280 million worth of imports every year.

II. The Question Presented Here Involves a Question of Statutory Interpretation of Continuing Importance

Both the government and Micron attempt to minimize the significance of the Federal Circuit's decision. The government argues that the decision does not create a circuit conflict, and that the issues presented in this case are not likely to recur due to revised regulatory provisions. U.S. Opp. Br. (Hitachi)[1] at 9. Micron argues that the non-precedential character of the Federal Circuit opinion renders it unworthy of review, and that the issues here are not likely to recur, but for different reasons than those offered by the government. Micron Opp. Br. at 14–16.

These straw men arguments are easily disposed of. Because the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade, *see* 28 U.S.C. § 1295(a)(5), it is of course impossible for a circuit conflict to exist over an issue of trade law. The Federal Circuit has the only and last word for the entire nation on this issue—subject to this Court's review. And while it is true that the Federal Circuit decision sought to be

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[1] The government's Memorandum in Opposition to Renesas' petition incorporates by reference the government's Brief in Opposition to the companion petition for certiorari filed by Hitachi High Technologies America, Inc., docketed as No. 05-918.

reviewed here is unpublished and non-precedential, it followed the holding of a published, precedential Federal Circuit decision, *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) (*Consolidated Bearings I*), "that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate." Pet. App. 2, citing Pet. App. 26–49. *Consolidated Bearings I* established a precedential rule of statutory construction of 19 U.S.C. § 1675(a)(2)(C) that the Federal Circuit followed in this case, and that rule of statutory construction is worthy of review precisely because it will continue to govern antidumping cases in the Federal Circuit. Renesas' petition for certiorari squarely presents this important issue.

The issue of statutory construction involved in this case is not mooted or otherwise rendered unlikely to recur because of the (different) reasons cited by the government and Micron. The government asserts without further explanation that "the issues presented in this case . . . are unlikely to recur due to revised regulatory provisions." U.S. Opp. Br. (Hitachi) at 9. Later, the government notes that the regulatory language governing requests for review has been slightly changed since the reviews at issue in this case. *See id.* at 3 n.2, 13–14. The government, however, never disputes Renesas' statement that these slight changes are not substantive. *See* Pet. at 8 n.2. In any event, the resolution of the question presented turns upon *statutory*, as opposed to regulatory, language. The question presented is "[w]hen a request for administrative review of antidumping duties

encompasses goods manufactured by a producer, does 19 U.S.C. § 1675(a)(2)(C) require that the review results be the basis for the assessment of duties on imports when the importer purchases the goods from a third-party reseller rather than directly from the producer?" Pet. at i. As Renesas argues, the statutory language alone compels the conclusion that the scope of the request for review determines the scope of "merchandise covered by the determination" under Section 1675(a)(2)(C). Pet. at 22–23. To be sure, Renesas also argues that regulatory language *additionally* supports its argument, *id.* at 23–24, but Renesas' argument does not turn upon regulatory language.

Micron argues that this case does not involve a recurring controversy worthy of review because the assessment policy imposed by Commerce on Renesas (based on the producer's cash deposit rate) is different from the assessment policy now imposed by Commerce on importers (based on "all others" rate). *See* Micron Opp. Br. at 15–16. Micron does not dispute, however, that *both* the previous assessment policy and the current assessment policy suffer from the same defect that Renesas complains of: the failure to assess such duties in accordance with review results as mandated by 19 U.S.C. § 1675(a)(2)(C). *See* Pet. at 14 n.7. Because the current assessment policy disadvantages Renesas and similarly situated importers in the same fundamental way as the previous policy, the question presented is of continuing general significance. *See Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S.

656, 662 (1993) (changes to challenged statute did not moot the controversy because the amended statute disadvantaged the plaintiffs in the same fundamental way as the prior version of the statute); *Rosetti v. Shalala*, 12 F.3d 1216, 1233 (3d Cir. 1993) (changes in regulations did not moot statutory claim when changes did not provide full relief sought by plaintiff under the statute).

III. The Question Presented Involves an Issue of Statutory Construction, Not an Issue of Fact

Micron argues (Micron Opp. Br. at 20–21) that accepting review here would entail review of the Federal Circuit's factual determination in this case and in *Consolidated Bearings II*[2] that Commerce "has consistently liquidated unreviewed entries at the cash deposit rate." Pet. App. at 2 (citing *Consolidated Bearings II*). On the basis of its prior decision in *Consolidated Bearings II*, the Federal Circuit here concluded that the assessment policy Commerce imposed upon Renesas was not "arbitrary, capricious, or an abuse of discretion." *Id.*

Micron's argument is wrong and misleading. The Federal Circuit in this case decided two distinct issues: first, as a matter of *law*, whether Renesas was statutorily entitled to the producer's review rate, and second, as a matter of *fact*, whether the assessment policy Commerce imposed upon Renesas

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[2] *Consolidated Bearings Co. v. United States*, 412 F.3d 1266 (Fed. Cir. 2005), Pet. App. 50–66.

so deviated from Commerce's previous practices such that it was arbitrary, capricious, or an abuse of discretion. The Federal Circuit decided both issues in favor of respondents Micron and the government. *See* Pet. App. at 2. In its petition for certiorari, Renesas only seeks review of the legal issue of statutory interpretation decided by the Federal Circuit. *See* Pet. at i. Nowhere does Renesas seek review of the Federal Circuit's factual determination in this case (based upon *Consolidated Bearings I*) that Commerce's assessment policy in this case does not represent a deviation from Commerce's past practices.

Thus, if this Court grants review of the question presented in Renesas' petition, it will not have to undertake any review of the factual issues associated with Commerce's past practices. Instead, this Court can assume, as found by the Federal Circuit, that Commerce's assessment policy with respect to Renesas was entirely consistent with Commerce's previous assessment policy. That still leaves open the other issue decided by the Federal Circuit in this case and presented to this Court, namely, whether Renesas was *statutorily* entitled to the producer's review rate because Micron's request for review applied to products "*manufactured and/or sold by*" the producer.

IV. Under the Statute, a Request for Review Determines the Scope of a Review

The government argues that under Section 1675(a)(2)(C), Renesas' entries were not covered by

Commerce's review because neither Renesas nor its reseller requested a review of those entries, and the producer provided no information regarding Renesas' imports as part of the review. U.S. Opp. Br. (Hitachi) at 10. Nevertheless, *Micron's* request for review did encompass Renesas' entries, because Micron's request for review applied to products "*manufactured and/or sold by*" the producer.

Under the statute, the scope of the administrative review turns on the scope of a request for review. *See* 19 U.S.C. § 1675 (after a request for review is made, Commerce is required to "review, and determine . . . the amount of any antidumping duty," *id.* § 1675(a)(1)(B), of "each entry of the subject merchandise," *id.* § 1675(a)(2)(A)). Thus, a request for review determines the scope of "each entry of the subject merchandise" included within the review, which in turn determines the scope of "merchandise covered by the determination" under Section 1675(a)(2)(C).

In this case, Micron requested that reviews be undertaken with respect to products "manufactured and/or sold by" the producer—a fact conspicuously ignored by the government in its opposition. Because the statute specifically contemplates that the denomination of a producer's products may apply to *both* products manufactured and sold by the producer, *see* 19 U.S.C. § 1677(28) (defining "exporter or producer" to mean the exporter of the subject merchandise, the producer of the subject merchandise, or *both where appropriate*") (emphasis supplied), Micron was entitled to make the broad

request that it did, and Renesas was entitled to rely upon that request in declining to seek its own redundant review.

The government argues that under the regulation in place in 1994 at the time of Micron's request, the definition of "reseller" excluded "producer," and therefore it would have been impossible to request a review of a producer that encompassed goods manufactured by the producer and in turn resold. *See* U.S. Opp. Br. (Hitachi) at 14 (citing 19 C.F.R. §§ 353.22(a)(1) and 353.2(s) (1994). The flaw in the government's argument is that it focuses on "reseller" rather than the crucial term "producer." Merely because the term "reseller" excluded "producer" by definition does not mean that the term "producer" in a request for review could not apply, as Micron's did, to goods "*manufactured and/or sold*" by a producer. Instead, as noted above, 19 U.S.C. § 1677(28) expressly contemplates that the denomination of a producer's products may apply to *both* producer sales and third party resales of the producer's products.

V. Commerce's Inconsistent Treatment of Prospective Cash Deposits and Retrospective Duty Assessments Shows that Commerce's Statutory Construction Is Untenable

The statute is clear: The results of an administrative review apply "for the assessment of . . . antidumping duties on entries of merchandise covered by the determination *and* for deposits of